No. 77-879

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE BAILEY COMPANY, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A9–A40) is reported at 563 F. 2d 439. The opinion of the district court (Pet. App. A1–A8) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1977. The petition for a writ of certiorari was filed on December 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a white employee who suffers the loss of interracial associations due to unlawful discrimination against blacks is a person "aggrieved" within the meaning of Section 706(b) of Title VII of the Civil Rights Act of 1964.

STATUTES INVOLVED

Section 706(b) of Title VII of the Civil Rights Act of 1964, 78 Stat. 259, as amended, 42 U.S.C. (Supp. V) 2000e–5(b), provides in pertinent part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer * * * has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge * * * within ten days, and shall make an investigation thereof. * * * If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. * * *

Section 706(f)(1) of Title VII, 78 Stat. 260, as amended, 42 U.S.C. (Supp. V) 2000e–5(f)(1), provides in pertinent part:

> If within thirty days after a charge is filed with the Commission * * *, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. * * *

STATEMENT

On October 19, 1970, Cecile W. Wade, a white female, filed a charge with the Equal Employment Opportunity Commission, alleging that petitioner, the Bailey Company, had discriminated against her with respect to a promotion on the basis of sex and that petitioner had discharged her because she planned to file a charge of discrimination with the Commission. On January 13, 1972, Mrs. Wade filed an amended charge, alleging that the petitioner discriminated against women generally in promotion and pay and had failed "to recruit and hire Negro females because of their race" (Pet. App. A11). An investigation of Mrs. Wade's charges disclosed that the company had employed blacks only as utility porters or shop workers; and that although blacks comprised 20 percent of the local population they constituted only 4 percent of the company's Nashville workforce (Pet. App. A11).

On November 13, 1972, the Commission issued its reasonable cause determination. Although it found no cause to believe that Mrs. Wade had been the victim of discrimination on the basis of sex, the Commission did find reasonable cause to believe that petitioner discriminated in recruitment and hiring on the basis of race and religion. After conciliation failed, the Commission filed the instant suit, charging racial and religious discrimination (Pet. App. A12).

After trial, the district court dismissed the complaint for lack of jurisdiction, ruling that Mrs. Wade, a white woman, had no standing because she had not suffered "a direct and personal deprivation" from racial or religious discrimination [1] and thus was not a "person aggrieved" under Section 706(b) of Title VII (Pet. App. A1–A8).

The court of appeals affirmed the dismissal of the religious discrimination claim because "allegations of religious discrimination exceeded the scope of the EEOC investigation of appellee reasonably expected to grow out of Mrs. Wade's charge of sex and race discrimination" (Pet. App. A19). The court reversed the dismissal of the race discrimination claim, however, because "Mrs. Wade amended her charge to allege that appellee failed to hire black females" (Pet. App. A30) and "if Mrs. Wade could charge race discrimination, then the EEOC investigation of appellee for race discrimination was pursuant to a valid charge" (*ibid*). The court held that under this Court's ruling in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, Mrs. Wade was "a person claiming to be aggrieved" by discrimination against racial minorities within the meaning of Section 706(b) of Title VII (Pet. App. A32).

ARGUMENT

We recently addressed the standing of a white female employee to challenge discrimination against

[1] The defendant's motion for summary judgment on that ground had been denied before trial with leave to renew at trial.

blacks that affects her working environment in our brief in opposition in *Heublein Inc., and United Vintners, Inc.* v. *Laurel Waters and The Equal Employment Opportunity Commission*, No. 76–1441, certiorari denied June 27, 1977. As we noted in that brief, the issue is controlled by this Court's decision in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205.

In *Trafficante*, the Court held that white tenants who alleged the loss of benefits from interracial associations as the result of discriminatory housing practices were "persons aggrieved" within the meaning of Section 810 of Title VIII of the Civil Rights Act of 1968, 82 Stat. 85, 42 U.S.C. 3610. Emphasizing the legislative choice of the broad and inclusive "person aggrieved" language in the Civil Rights Act of 1968, the Court concluded that injuries caused by living in a segregated environment were sufficient to confer on the white plaintiffs standing to litigate violations of the Act. 409 U.S. at 209.

The same considerations apply to Title VII,[2] in which Congress also has provided a statutory cause of action for any "person claiming to be aggrieved" (42 U.S.C. (Supp. V) 2000e-5(b) and 5(f)(1)).

[2] Indeed, in *Trafficante*, the Court relied upon and quoted with approval the Third Circuit's opinion in a Title VII case, which stated that Congress, in allowing a suit under Title VII by any "person claiming to be aggrieved," indicated its "intention to define standing as broadly as is permitted by Article III of the Constitution." 409 U.S. at 209, quoting *Hackett* v. *McGuire Brothers, Inc.*, 445 F. 2d 442, 446 (C.A. 3).

Indeed, "the purposes and effects of Title VII in the employment field are identical to the purposes and effects of Title VIII in the housing field" (Pet. App. A34). As the court below stated (Pet. App. A34): "The loss of benefits from the lack of interracial associations is as real at work as it is at home because 'inter-personal contacts' occur in both places." The congressional supporters of Title VII also recognized that the effects of discrimination would extend beyond the individuals who are the direct objects of discriminatory practices.[3] Petitioner cites no legislative history, and we have found none, indicating that Congress intended to confer a narrower right of action in Title VII cases than has been recognized under Title VIII.[4]

The courts of appeals that have addressed this question, now joined by the court below, have uniformly concluded that an employee's interest in working under non-discriminatory conditions is sufficient to support a challenge to unlawful employment practices directed at others. See *Gray* v. *Greyhound Lines, East*, 545 F. 2d 169 (C.A.D.C.); *Waters* v. *Heublein,*

[3] H.R. Rep. No. 914, 88th Cong. 1st Sess. Pt. 2, pp. 26–30 (1963) (additional views of Reps. McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias and Bromwell).

[4] Just as in *Trafficante*, *supra*, the "consistent administrative construction of the Act" (409 U.S. at 210) indicates that Title VII confers standing on those aggrieved by the loss of benefits from interracial association as a result of discrimination (Pet. App. A35). See EEOC Decision No. 72–0591 (1971), CCH EEOC Decisions (1973), para. 6314, 4 FEP Cases 309; EEOC Decision No. 70–09 (1969), CCH EEOC Decisions (1973), para. 6026.

Inc., 547 F. 2d 466 (C.A. 9), certiorari denied June 27, 1977 (No. 76–1441). Petitioner has presented no reason for this Court to reconsider its recent determination that this question does not merit plenary review.[5]

Petitioner contends (Pet. 8) that a disagreement exists between the court below and the reasoning of the Court of Appeals for the Fourth Circuit in *Equal Employment Opportunity Commission* v. *General Electric Co.*, 532 F. 2d 359, concerning the scope of a Commission investigation that can reasonably be expected to grow out of a charge limited to either race or sex discrimination. The petition does not present any question concerning the extent to which the charge filed should have limited the Commission's complaint, but only whether Mrs. Wade was an aggrieved person "for the purpose of filing a charge of discrimination on the basis of race" (Pet. 2). In addition, the opinions cited are not in conflict.[6] *General*

[5] Petitioner argues (Pet. 8–9) that Mrs. Wade did not suffer "injury in fact." But the Court in *Trafficante* held that the lack of opportunity for association constituted the injury under the Civil Rights Act (409 U.S. at 209) and ensured that "the dispute tendered by this complaint is presented in an adversary context" (409 U.S. at 211). Although Mrs. Wade is no longer employed by petitioner, her injury from past denial of the opportunity for interracial associations has not diminished and, if her discharge had been found to have been discriminatory (as she claimed), she would have been entitled to reinstatement under Section 706(g) of Title VII, 42 U.S.C. (Supp. V) 2000e–5(g).

[6] In *Equal Employment Opportunity Commission* v. *Quick Shop Markets, Inc.*, 526 F. 2d 802 (C.A. 8), cited by petitioner (Pet. 7) as in apparent conflict, the Commission did not appeal the district court's ruling that charges of sex discrimination filed by whites

Electric held that a complaint of race discrimination could serve as the basis for a Commission complaint of race and sex discrimination in a case in which "the same material, *i.e.*, the tests used by the defendant, give rise to a reasonable cause to believe the defendant thereby is practicing discrimination both racial and sexual" (532 F. 2d at 370). The court below stated *in dicta* (Pet. App. A28–A30) that absent a charge of race discrimination by Mrs. Wade, it would have held that the Commission could not properly investigate and charge racial discrimination in its complaint. The court below did not purport to "reject[ed] the reasoning of the Fourth Circuit" (Pet. 8) but simply held that "[i]n the present case there was no such common source of discrimination against blacks and women" (Pet. App. A29). But, in contrast to the situation in *General Electric*, the complainant here did file a charge of both race and sex discrimination so that the Commission's investigation was pursuant to a valid charge (Pet. App. A3), and the question of what limitation the private charge may impose upon subsequent Commission actions is therefore not presented by this case.[7]

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would not support an investigation into discrimination against blacks. The court of appeals affirmed on other issues but had no occasion to consider the proper scope of the Commission's investigation and complaint. Petitioner acknowledges as much by stating that the court of appeals did "not discuss this issue specifically" (Pet. 7).

[7] The court below also held that the Commission could not bring suit for religious discrimination because "allegations of religious discrimination could not reasonably be expected to grow out of Mrs. Wade's charge" (Pet. App. A21). No question is presented in this Court concerning that holding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.

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* The Solicitor General is disqualified in this case.

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